

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In the Matter of the Complaint of GLENN
FAGERLIN,

No. C-08-5225 EMC

**REPORT AND RECOMMENDATION
RE PLAINTIFF'S *EX PARTE*
APPLICATION FOR ORDERS**

(Docket No. 2)

Plaintiff Glenn Fagerlin initiated this limitation of liability action pursuant to the Limitation of Liability Act, *see* 46 U.S.C. § 30511, and Supplemental Admiralty Rule F. Mr. Fagerlin seeks: (1) an order enjoining the prosecution of any and all other claims; and (2) an order directing the issuance of notice to potential claimants. Having considered Mr. Fagerlin's brief and accompanying submissions, as well as the oral argument of counsel for Mr. Fagerlin, the Court hereby recommends that his ex parte application be **GRANTED**.¹

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¹ Although Mr. Fagerlin has consented to proceeding before a magistrate judge, claimants who may appear in this action may not. *See* 28 U.S.C. § 636(c)(1) (allowing a magistrate judge to "conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case" but only "[u]pon the consent of the parties"); *United States v. Real Property*, 135 F.3d 1312, 1316-17 (9th Cir. 1998) (implicitly holding that the proper filing of a claim confers "party" status for purposes of 28 U.S.C. 636(c)(1)). Furthermore, Mr. Fagerlin seeks injunctive relief and a magistrate judge is not permitted to rule on a motion for such relief. *See id.* § 636(b)(1)(A) (providing that "a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief").

I. FACTUAL & PROCEDURAL BACKGROUND

In his complaint, Mr. Fagerlin alleges as follows.

Mr. Fagerlin is the owner of a forty-five-foot Catamaran named “Perception.” *See* FAC ¶ 2. On June 8, 2008, Mr. Fagerlin was sailing the Perception in the San Francisco Bay. *See* FAC ¶ 12. There was a collision with another vessel, the “Touch of Gray.” *See* FAC ¶ 13. Each vessel sustained damage to the hull. *See* FAC ¶ 13.

Mr. Fagerlin is informed and believes that Joseph Eric Archuleta is the owner of the Touch of Gray. *See* FAC ¶ 3. Mr. Archuleta was on the Touch of Gray on the day of the accident. *See* FAC ¶ 3. Other passengers and/or crew members on the Touch of Gray on the day of the accident included James R. Cox, John Dale Prater, Galen Angel Sepulveda, and Nick John Dozier. *See* FAC ¶¶ 5-8.

After the accident occurred, Mr. Archuleta initiated a state court action against Mr. Fagerlin, claiming negligence and infliction of emotional distress. *See* FAC ¶ 15. According to Mr. Fagerlin, Mr. Archuleta has yet to perfect service of process in the state court action. *See* FAC ¶ 15.

Also, since the day of the accident, Mr. Archuleta made a claim to St. Paul Fire & Marine Insurance Company, which is the insurer of the hull and machinery on the Touch of Gray. *See* FAC ¶¶ 4, 16. Mr. Fagerlin is informed and believes that St. Paul paid the claim. *See* FAC ¶ 16. According to Mr. Fagerlin, St. Paul has now filed suit against him in state court, seeking damages in the amount of \$16,727.69, although service of process has yet to be perfected. *See* FAC ¶ 15.

The fair market value of the Perception, as it stands post-collision, is approximately \$160,000. *See* FAC ¶ 11 & Ex. A (stating that there was an appraisal post-collision on October 4, 2008, and providing copy of appraisal).

Mr. Fagerlin initiated the instant lawsuit on November 19, 2008. *See* Docket No. 1 (complaint).

II. DISCUSSION

Title 46 U.S.C. § 30511 of the Limitation of Liability Act provides that “[t]he owner of a vessel may bring a civil action in a district court of the United States for limitation of liability under this chapter [46 U.S.C. § 30501 *et seq.*]. The action must be brought within 6 months after a

claimant gives the owner written notice of a claim.”² 46 U.S.C. § 30511(a). The statute further provides:

- (b) Creation of fund. When the action is brought, the owner . . . shall --
 - (1) deposit with the court, for the benefit of claimants --
 - (A) an amount equal to the value of the owner’s interest in the vessel and pending freight, or approved security; and
 - (B) an amount, or approved security, that the court may fix from time to time as necessary to carry out this chapter [46 U.S.C. § 30501 *et seq.*]; or
 - (2) transfer to a trustee appointed by the court, for the benefit of claimants --
 - (A) the owner’s interest in the vessel and pending freight; and
 - (B) an amount, or approved security, that the court may fix from time to time as necessary to carry out this chapter [46 USCS §§ 30501 *et seq.*].

Id. § 30511(b). Finally, the statute states that, “[w]hen an action has been brought under this section and the owner has complied with subsection (b), all claims and proceedings against the owner related to the matter in question shall cease.” *Id.* § 30511(c).

Consistent with § 30511, Supplemental Admiralty Rule F provides that,

[n]ot later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court . . . for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner’s interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at the owner’s option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner’s interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended.

² “[T]he prevailing view of the Courts of Appeals is that the Act itself arguably does not create a basis for federal jurisdiction. . . . Normally, since the right to limitation arises out of a casualty involving a vessel, the jurisdictional basis will be admiralty.” 29-708 Moore’s Fed. Prac. -- Civ. § 708.02.

1 Supp. Admir. R. F. Unlike § 30511, however, Supplemental Admiralty Rule F also requires a
2 plaintiff in an action for limitation of liability to “give security for costs and, if the plaintiff elects to
3 give security, for interest at the rate of 6 percent per annum from the date of the security.” Supp.
4 Admir. R. F(1).

5 In addition to the above, Supplemental Admiralty Rule F provides that, once the owner has
6 made the deposits described above, “all claims and proceedings against the owner or the owner’s
7 property with respect to the matter in question shall cease.” Supp. Admir. R. F(3). It goes on
8 further to state that, “[o]n application of the plaintiff the court shall enjoin the further prosecution of
9 any action or proceeding against the plaintiff or the plaintiff’s property with respect to any claim
10 subject to limitation in the action.” Supp. Admir. R. F(3).

11 Finally, Supplemental Admiralty Rule F provides that, once the owner has made the deposits
12 described above,

13 the court shall issue a notice to all persons asserting claims with
14 respect to which the complaint seeks limitation, admonishing them to
15 file their respective claims with the clerk of the court and to serve on
16 the attorneys for the plaintiff a copy thereof on or before a date to be
17 named in the notice. The date so fixed shall not be less than 30 days
18 after issuance of the notice. For cause shown, the court may enlarge
19 the time within which claims may be filed. The notice shall be
20 published in such newspaper or newspapers as the court may direct
21 once a week for four successive weeks prior to the date fixed for the
22 filing of claims. The plaintiff not later than the day of second
23 publication shall also mail a copy of the notice to every person known
24 to have made any claim against the vessel or the plaintiff arising out of
25 the voyage or trip on which the claims sought to be limited arose. In
26 cases involving death a copy of such notice shall be mailed to the
27 decedent at the decedent’s last known address, and also to any person
28 who shall be known to have made any claim on account of such death.

Supp. Admir. R. F(4).

23 Notably, a “claimant may by motion demand that the funds deposited in court or the security
24 given by the plaintiff be increased” -- either “on the ground that they are less than the value of the
25 plaintiff’s interest in the vessel and pending freight” or “on the ground that it is insufficient to carry
26 out the provisions of the statutes relating to claims in respect of loss of life or bodily injury.” Supp.
27 Admiralty R. F(7).

1 A. Security

2 As noted above, both § 30511 and Supplemental Rule F require Mr. Fagerlin to provide
3 certain security in order to proceed with his limitation of liability action.

4 1. Stipulation as Security in Lieu of Cash or Bond

5 As a preliminary matter, the Court notes that, in an admiralty proceeding such as this, a
6 stipulation is all that is needed for security -- *i.e.*, not a deposit of cash or a posting of a bond.
7 Moore's treatise explains: "[A] stipulation is generally accepted as security if backed up by
8 insurance covering the vessel's potential liabilities. If there is no insurance, or the insurance is
9 inadequate to cover the value of the vessel . . . , or, alternatively, the amount of the claims against
10 the owner, then other forms of security may be required, such as a bond or cash." 29-708 Moore's
11 Fed. Prac. -- Civ. § 708; *see also* 3 Benedict on Admiralty § 14, at 2-12 (7th ed. 2008) ("If the ship
12 is still useful to [the shipowner], and he desires to keep her in operation, he will have her appraised
13 and furnish the court with an approved surety company stipulation or pay the cash value for which
14 the ship is appraised, plus freight.").

15 2. Security for Costs

16 As stated above, Supplemental Admiralty Rule F expressly requires a plaintiff in an action
17 for limitation of liability to "give security for costs." Supp. Admir. R. F(1). Mr. Fagerlin therefore
18 must be willing to provide security for costs in order for his limitation of liability action to proceed.
19 Admiralty Local Rule 5-1 provides that "[t]he amount of security for costs under FRCivP Supp F(1)
20 shall be \$1,000 unless otherwise ordered, and may be combined with the security for value and
21 interest." Admir. L.R. 5-1. The Court therefore recommends that Mr. Fagerlin provide security in
22 the amount of \$1,000 to cover costs, although a claimant is not barred from asking for a greater
23 amount of security for costs. The security may be in the form of a stipulation.

24 3. Security for Value and Interest

25 Both the Limitation of Liability Act and Supplemental Admiralty Rule F require a plaintiff
26 (1) to deposit a certain amount of security with the court *or* (2) to transfer his interest in the vessel
27 and pending freight to a trustee to be appointed by the court, in order to proceed with an action for
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1 limitation of liability. In the instant case, Mr. Fagerlin provided, as an attachment to his original
2 complaint, a letter of undertaking in which he states, under penalty of perjury, as follows:

3 I undertake to keep and maintain the PERCEPTION in trust,
4 and not dispossess myself of her or any interest in her, and/or to
5 maintain personal monetary reserves in the amount of \$160,000 plus
6 six percent yearly interest, pending the court's adjudication (after final
7 appeals, if any) of any claims against me as a result of the collision. In
8 the event of a final decree (after final appeals, if any) being entered
9 against me, I agree to pay the full amount of any such claim, up to and
10 including the value of the PERCEPTION, \$160,000. This undertaking
11 is not an admission of any liability whatsoever, or any waiver of rights
12 that I or the PERCEPTION may possess.

13 Compl., Ex. A.

14 At the hearing on Mr. Fagerlin's ex parte application, the Court initially noted that it was not
15 inclined to recommend that Mr. Fagerlin be appointed as trustee because it was not aware of any
16 authority stating that a plaintiff in a limitation of liability action may be appointed trustee.
17 Moreover, Mr. Fagerlin had not cited to any such authority. The Court was concerned that Mr.
18 Fagerlin, subject to claims against the vessel, might not necessarily act in the interests of the
19 claimants, particularly when the security held by the trust was a mere undertaking by Mr. Fagerlin.

20 The Court therefore examines whether Mr. Fagerlin has offered to provide adequate security.
21 There is evidence in the record that the vessel at issue has been appraised at approximately
22 \$160,000. *See* FAC, Ex. A (appraisal). Furthermore, Mr. Fagerlin has declared under penalty of
23 perjury that he will pay \$160,000. *See* Compl., Ex. A (letter of undertaking). Finally, counsel for
24 Mr. Fagerlin has now (after the hearing on the ex parte application) submitted a declaration stating
25 that he has created a trust account for purposes of the litigation and that Mr. Fagerlin has wired the
26 sum of \$165,500 into the trust account. "The sum of \$165,[5]00 represents (a) the independently
27 appraised value of the S/V PERCEPTION as of October 2008 (\$160,000); (b) 6% annual interest on
28 \$16[0],000 for a period of six months (\$4,800); and (c) filing fees for two potential claimants who
have filed legal actions in California State court (\$700)." Donlon Decl. ¶ 3.

In light of the appraisal, the Court recommends that the \$160,000 in the trust account is
adequate security for the value of the vessel. In addition, the amount of \$4,800, representing six
percent interest on the value of the vessel, is, for the time being, adequate security, although a

1 claimant or the presiding judge may wish to have that amount increased if the litigation continues
2 beyond six months. Finally, as noted above, the Court recommended that Mr. Fagerlin be required
3 to provide security for costs in this litigation in the amount of \$1,000. Mr. Fagerlin has provided
4 funds of \$700; the Court recommends that an additional \$300 be placed into the trust account to
5 represent security for costs. Of course, the security in the trust account shall be subject to the
6 provisions of Supplemental Admiralty Rule F, which allows a potential claimant to contest the
7 security provided. *See* Supp. Admir. R. F(7). Given that the trust now holds cash as security, the
8 risk that Mr. Fagerlin, as trustee, would act to the detriment of the client is no longer substantial.

9 B. Stay and/or Injunction

10 In his application, Mr. Fagerlin also seeks an order enjoining the prosecution of any and all
11 other claims against him with respect to the matter at issue. As noted above, both the Limitation of
12 Liability Act and Supplemental Admiralty Rule contemplate a stay and/or injunction once proper
13 security has been provided. 46 U.S.C. § 30511(c) states that “[w]hen an action has been brought
14 under this section and the owner has complied with subsection (b), all claims and proceedings
15 against the owner related to the matter in question shall cease.” Supp. Admir. R. F (3) states that
16 “[u]pon the owner’s compliance with subdivision (1) of this rule all claims and proceedings against
17 the owner or the owner’s property with respect to the matter in question shall cease” and that, “[o]n
18 application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding
19 against the plaintiff or the plaintiff’s property with respect to any claim subject to limitation in the
20 action.” *See also Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234, 236 (9th Cir. 1989) (noting
21 that, pursuant to the above provisions, “admiralty courts issue a restraining order or an injunction
22 staying all proceedings pending elsewhere”); *In re San Francisco Bar Pilots*, No. C05-02975 MJJ,
23 2006 U.S. Dist. LEXIS 2147, at *3 (N.D. Cal. Jan. 24, 2006) (stating that, “[w]hen, as here, a
24 shipowner invokes the protection of the act, a district court is empowered to issue a restraining order
25 or injunction staying all proceedings against the shipowner arising out of the incident”).

26 Because the Court is recommending that the presiding judge approve the security provided
27 by Mr. Fagerlin, the Court recommends that a stay and injunction be issued -- that is, so long as Mr.
28 Fagerlin provides additional security for costs in the amount of \$300. Consistent with Supplemental

Admiralty Rule F, the stay and injunction should bar only prosecution of “any action or proceeding against the plaintiff or the plaintiff’s property with respect to any claim subject to limitation in the action.” Supp. Admir. R. F(3).

C. Notice

Finally, Mr. Fagerlin asks for an order directing the issuance of notice to potential claimants. The Court hereby recommends that notice in the form described below be provided. Consistent with Supplemental Admiralty Rule F, the notice should be published in (1) the *Recorder* and (2) the *San Francisco Chronicle* for four successive weeks prior to the date fixed for the filing of claims, which shall not be less than 30 days after issuance of the notice.³ See Supp. Admir. R. F(4). Moore’s treatise advises setting the claims bar date 60-120 days from the date of the notice, depending on the number of expected claimants. See 29-708 Moore’s Fed. Prac. -- Civ. § 708.01[1] (“The length of time to be allowed will generally be determined by the number of expected potential claimants and allowing a reasonable time period for them to learn of the pendency of the limitation action and file their claims.”).

In addition, consistent with Rule F, the notice should be mailed to all known potential claimants, including but not limited to those persons identified in Plaintiffs’ complaint. See Supp. Admir. R. F(4).

III. RECOMMENDATION

For the foregoing reasons, the Court recommends that the relief sought by Mr. Fagerlin be granted, contingent upon Mr. Fagerlin providing an additional \$300 as security for costs (for a total of \$1,000 as security for costs). More specifically, the Court recommends:

- (1) That the security provided by Mr. Fagerlin (which includes six months of interest on the principal amount of \$160,000 at the rate of 6% per annum) be approved, subject to the provisions of Supplemental Admiralty Rule F, which allows the presiding judge to require

³ In his proposed order, Mr. Fagerlin suggested that publication notice in the *Recorder* would be adequate. The Court, however, recommends that there should also be publication notice in a newspaper of general circulation, such as the *San Francisco Chronicle*. Supplemental Admiralty Rule F contemplates publication notice in more than just one newspaper. See Supp. Admir. R. F(4).

additional security and which allows a potential claimant to contest the security provided.

See Supp. Admir. R. F(1), (7).

(2) That a stay and injunction be issued that bars prosecution of any action or proceeding against Mr. Fagerlin or his property “with respect to any claim subject to limitation in the action.”

Supp. Admir. R. F(3).

(3) That publication notice be made in (a) the *Recorder* and (b) the *San Francisco Chronicle* for four successive weeks prior to the date fixed for the filing of claims *See* Supp. Admir. R. F(4). The date fixed for the filing of claims shall be no less than 60 days after issuance of the notice.

(4) That mail notice be made on all known potential claimants, including but not limited to those persons identified in Plaintiffs’ complaint. *See* Supp. Admir. R. F(4). Such mail notice should include as an attachment a copy of Supplemental Admiralty Rule F, since it provides specific information as to how a claimant should file a claim and/or answer and how a claimant should contest the security provided. Furthermore, such mail notice should be made no later than the date of the second publication notice as provided by Supplemental Admiralty Rule F. *See* Supp. Admir. R. F(4).

(5) That the language of the publication notice and mail notice be in the following form (with a copy of Supplemental Admiralty Rule F to be attached to the mail notice):

Notice is hereby given that Plaintiff GLENN FAGERLIN, as owner of a 45-foot Catamaran named *Perception*, has filed a complaint in the U.S. District Court for the Northern District of California pursuant to 46 U.S.C. § 30501 *et seq.*, claiming the right to exoneration from, or limitation of liability for, all claims allegedly resulting from an incident which occurred on or about June 8, 2008, when the vessel described above was involved in a collision in the San Francisco Bay with another vessel named *Touch of Gray*, all as more fully set forth in the complaint.

All persons asserting claims with respect to which the complaint seeks limitation are admonished to (1) file their respective claims with the Clerk of this Court at the United States District Court, Northern District of California, U.S. Courthouse, 450 Golden Gate Ave., 16th floor, San Francisco, California 94102, **and** (2) to serve on attorneys for Mr. Fagerlin, Severson & Werson, 1 Embarcadero Center, Suite 2600, San Francisco, California 94111, a copy of their claims. Filing and service of the claims must be made on or before _____, 2009, or the claims shall be **defaulted**, *i.e.*, they shall forever


1 be barred. A claim must specify the facts upon which the claimant
2 relies in support of the claim, the items thereof, and the dates on which
the same accrued. A personal appearance is not required.

3 Any claimant desiring to contest either the right to exoneration
4 from or the right to limitation of liability shall, **in addition to the**
above, file and serve an answer to the complaint as required by
5 Supplemental Admiralty Rule F to the Federal Rules of Civil
6 Procedure (available at <http://www.uscourts.gov/rules/>), unless the
claim has included an answer.

7 A claimant has the right to demand, by motion, that any
8 security given by Mr. Fagerlin be increased on the ground that it is
less than the value of Mr. Fagerlin's interest in the vessel and pending
9 freight or that it is insufficient to carry out the provisions of the
statutes relating to claims in respect of loss of life or bodily injury.

10 Any party may file objections to this report and recommendation with the district judge
11 within ten days after being served with a copy. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b);
12 Civil L.R. 72-3.

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15 Dated: January 23, 2009

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17 EDWARD M. CHEN
18 United States Magistrate Judge
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